# Target Term Sdn Bhd v Waldorf and Windsor Management Corp and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCVC)(W)-1890–10 OF 2021 AND W-02(NCVC)(W)-1929–10 OF 2021
RAVINTHRAN, CHE MOHD RUZIMA AND AZIZUL AZMI ADNAN JJCA
4 OCTOBER 2024

*Land Law — Strata title — Accessory parcel — Developer sold unit in apartment complex as well as unit's 414 accessory parcels (car park lots) to its related company — Whether company's use of the accessory parcels for a car park business contravened ss 34(2) and 69 of Strata Titles Act 1985 ('STA') — Whether renting out of car park parcels to customers was a 'dealing' prohibited under those sections of the STA — Whether users of the car parks were mere licencees and did not become tenants — Whether nothing in STA stated that if accessory parcel was not used 'in conjunction with' parcel to which it had been made appurtenant, such parcel would cease to be accessory parcel and become common property*

Malaysia Land Properties Sdn Bhd ('the developer') had constructed a mixed development complex which housed the Waldorf and Windsor Towers apartments. Via a sale and purchase agreement ('SPA'), the developer sold one apartment unit ('B-21–03') together with 420 car park lots to its related company, Target Term Sdn Bhd ('TT') so that TT could operate a car park business on those lots. According to the strata plan, only 414 of the car park lots were accessory parcels to unit B-21–03. When the management corporation ('MC') of the apartments billed TT for unpaid management charges and sinking fund contributions amounting to more than RM850,000, TT sued the MC for, inter alia, a declaration that the MC's claim was null and void as TT had incurred its own funds to maintain the car park units. In its counterclaim, the MC contended that the SPA between TT and the developer was unlawful and that TT could not claim title to the car park units because ss 34(2) and 69 of the Strata Titles Act 1985 ('the STA') had been contravened. The High Court agreed with the MC, dismissed TT's action and allowed the MC's counterclaim, holding that the SPA was null and void and unenforceable and that the 414 car park units were not accessory parcels to unit B-21–03 but common property. Section 34(2) of the STA provided that 'No rights in an accessory parcel shall be dealt with or disposed of independently of the parcel to which such accessory parcel has been made appurtenant'. Section 69 of the STA provided that 'No accessory parcel or any share or interests therein shall be dealt with independently of the parcel to which such accessory parcel has been made appurtenant as shown on the approved strata plan'. 'Accessory parcel' was

defined under s 4 of the STA as 'any parcel shown in a strata plan as an accessory parcel which is used or intended to be used in conjunction with a parcel'. The High Court held that TT's renting out of the car park units was a 'dealing' that was independent and separate from the main parcel (B-21–03) to which the car park parcels had been made appurtenant and was accordingly prohibited under ss 34(2) and 69 of the STA. The Court further held that since the car park units were not 'used in conjunction with' unit B-21–03, they became common property to which TT could not claim title. The instant appeals were against the High Court's decision.

**Held,** unanimously allowing TT's and the developer's appeals in part, dismissing the MC's cross-appeal and holding TT liable to pay the MC back-charges as set out in para 71 of the judgment:

(1) The customers of the car park were mere licencees and not tenants. Allowing a customer to use a car park lot did not amount to a 'dealing' in the accessory parcel. As such, ss 34(2) and 69 of the STA were not contravened. The facts of the case also did not show any contravention of the development order that was issued for the development of the subject complex. Consequently, the SPA between the developer and TT was not illegal or void and TT's title to the car park accessory parcels remained unaffected (see paras 25 & 41).

(2) Construing the renting out of the car park parcels as a 'dealing' was not correct. The cognate expression 'dealt with' in ss 34(2) and 69 of the STA did not encompass the act of allowing a customer a licence to temporarily occupy a car park lot. Hence, TT's act of operating a commercial car park business on the accessory parcels did not constitute 'dealing' in those parcels and, therefore, did not contravene ss 34(2) and 69 of the STA (see paras 27–28).

(3) The 414 car park parcels in the instant case were not common property. Under the STA, common property was defined as that which did not comprise any parcel or accessory parcel in an approved strata plan. Since the certified strata plan that was exhibited in evidence clearly identified the 414 car park units as accessory parcels, they could not then be construed as common property (see paras 29–32).

(4) Nowhere in the STA did it state that if an accessory parcel was not used or intended to be used in conjunction with the parcel to which it had been made appurtenant, then that accessory parcel would lose its character as a parcel and become common property. If rights and obligations were intended to be created or annulled by a provision of law, then it must be clearly set out in the legislation itself. Hence, the phrase 'an accessory parcel which is used or intended to be used in conjunction with a parcel' simply referred to an accessory parcel that had been made appurtenant to a parcel (see paras 33–34).

(5) TT was liable to pay back-charges to the MC in the following manner: (a) for the period between 11 July 2011 and 31 May2015, 31 sen per sqft in respect of unit B-21–03 and RM25 for each of the 414 car park parcels; (b) for the period between 1 June 2015 and 23 August 2016, RM3.4045 per share unit for maintenance charges and RM0.34045 per share unit as sinking fund contribution; and (c) from 24 August 2016 onwards — nil, for as long as charges had not been imposed on the basis of share units (see para 71).

(6) TT could not avoid liability that was imposed by statute. Nothing in the scheme of the applicable legislation suggested that a proprietor and a MC could contract out of the obligations imposed by written law. For this reason, TT's contention that it had paid for its own maintenance of the car park accessory parcels did not obviate its liability to pay the charges that had been imposed under the STA and under the Strata Management Act 2013 (see para 73).

**[Bahasa Malaysia summary**

Malaysia Land Properties Sdn Bhd ('pemaju') telah membina kompleks pembangunan bercampur yang menempatkan pangsapuri Waldorf dan Windsor Towers. Melalui perjanjian jual beli ('SPA'), pemaju telah menjual satu unit pangsapuri ('B-21–03') bersama 420 lot tempat letak kereta kepada syarikat berkaitannya, Target Term Sdn Bhd ('TT') supaya TT boleh menjalankan perniagaan tempat letak kereta di lot-lot tersebut. Mengikut pelan strata, hanya 414 daripada lot tempat letak kereta adalah petak aksesori kepada unit B-21–03. Apabila perbadanan pengurusan ('MC') pangsapuri tersebut mengeluarkan bil kepada TT untuk caj pengurusan yang belum dibayar dan sumbangan dana penjelas berjumlah lebih RM850,000, TT menyaman MC untuk, antara lain, satu deklarasi bahawa tuntutan MC adalah terbatal dan tidak sah kerana TT telah mengeluarkan dana sendiri untuk menyelenggara unit tempat letak kereta tersebut. Dalam tuntutan balasnya, MC berhujah bahawa SPA antara TT dan pemaju adalah menyalahi undang-undang dan TT tidak boleh menuntut hakmilik terhadap unit tempat letak kereta kerana ss 34(2) dan 69 Akta Hakmilik Strata 1985 ('AHS') telah telah dilanggar. Mahkamah Tinggi bersetuju dengan MC, menolak tindakan TT dan membenarkan tuntutan balas MC, dengan memutuskan bahawa SPA adalah batal dan tidak sah dan tidak boleh dikuatkuasakan dan bahawa 414 unit tempat letak kereta bukanlah petak aksesori kepada unit B-21–03 tetapi harta bersama. Seksyen 34(2) AHS memperuntukkan bahawa 'No rights in an accessory parcel shall be dealt with or disposed of independently of the parcel to which such accessory parcel has been made appurtenant'. Seksyen 69 AHS memperuntukkan bahawa 'No accessory parcel or any share or interests therein shall be dealt with independently of the parcel to which such accessory parcel has been made appurtenant as shown on the approved strata plan'. 'Petak aksesori' ditakrifkan di bawah s 4 AHS sebagai 'any parcel shown in a strata

plan as an accessory parcel which is used or intended to be used in conjunction with a parcel'. Mahkamah Tinggi memutuskan bahawa penyewaan TT bagi unit tempat letak kereta adalah 'urus niaga' yang bebas dan berasingan daripada petak utama (B-21–03) di mana petak tempat letak kereta telah dibuat sebagai appurtenant dan sewajarnya dilarang di bawah ss 34(2) dan 69 AHS. Mahkamah seterusnya memutuskan bahawa oleh kerana unit tempat letak kereta tidak 'digunakan bersama' unit B-21–03, ia menjadi harta bersama yang mana TT tidak boleh menuntut hakmilik. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi.

**Diputuskan,** sebulat suara membenarkan sebahagian rayuan TT dan pemaju, menolak rayuan balas MC dan memutuskan TT bertanggungjawab untuk membayar caj terkemudian MC seperti yang dinyatakan dalam perenggan 71 penghakiman:

(1) Pelanggan tempat letak kereta hanyalah pemegang lesen dan bukan penyewa. Membenarkan pelanggan menggunakan tempat letak kereta tidak sama dengan 'urus niaga' dalam petak aksesori. Oleh itu, ss 34(2) dan 69 AHS tidak dilanggar. Fakta kes juga tidak menunjukkan sebarang pelanggaran Perintah Pembangunan yang dikeluarkan untuk pembangunan subjek kompleks. Akibatnya, SPA antara pemaju dan TT tidak menyalahi undang-undang atau tidak sah dan hakmilik TT ke atas petak aksesori tempat letak kereta kekal tidak terjejas (lihat perenggan 25 & 41).

(2) Menganggap penyewaan petak tempat letak kereta sebagai 'urusniaga' adalah tidak betul. Ungkapan serumpun 'diuruskan' dalam ss 34(2) dan 69 AHS tidak merangkumi tindakan membenarkan pelanggan kepada lesen untuk menduduki tempat letak kereta buat sementara waktu. Oleh itu, tindakan TT mengendalikan perniagaan tempat letak kereta komersial pada petak aksesori tidak membentuk 'urus niaga' dalam petak tersebut dan, oleh itu, tidak melanggar ss 34(2) dan 69 AHS (lihat perenggan 27–28).

(3) 414 petak tempat letak kereta dalam kes semasa bukan harta bersama. Di bawah AHS, harta bersama ditakrifkan sebagai yang mana tidak terdiri daripada mana-mana petak atau petak aksesori dalam pelan strata yang diluluskan. Memandangkan pelan strata yang dieksibit sebagai keterangan dengan jelas mengenal pasti 414 unit tempat letak kereta sebagai petak aksesori, ia tidak boleh ditafsirkan sebagai harta bersama (lihat perenggan 29–32).

(4) Tiada mana-mana dalam AHS yang menyatakan bahawa jika sesuatu petak aksesori tidak digunakan atau bertujuan untuk digunakan bersama-sama dengan petak yang ia telah dibuat sebagai *appurtenant*, maka petak aksesori itu akan kehilangan sifatnya sebagai petak dan menjadi harta bersama. Apabila hak dan kewajiban diniat untuk digubal

atau dibatalkan oleh suatu ketetapan undang-undang, maka hal itu harus diatur dengan jelas dalam peraturan perundang-undangan itu sendiri. Oleh itu, frasa 'petak aksesori yang digunakan atau dimaksudkan untuk digunakan bersama dengan petak' hanya merujuk kepada petak aksesori yang telah dibuat berkaitan dengan petak (lihat perenggan 33–34).

(5) TT bertanggungjawab membayar caj terkemudian kepada MC mengikut cara berikut: (a) bagi tempoh antara 11 Julai 2011 dan 31 Mei 2015, 31 sen sekaki persegi bagi unit B-21–03 dan RM25 bagi setiap satu daripada 414 petak tempat letak kereta; (b) bagi tempoh antara 1 Jun 2015 dan 23 Ogos 2016, RM3.4045 seunit kongsi untuk caj penyelenggaraan dan RM0.34045 seunit kongsi sebagai sumbangan dana penjelas; dan (c) mulai 24 Ogos 2016 dan seterusnya — tiada, selagi caj belum dikenakan berdasarkan unit kongsi (lihat perenggan 71).

(6) TT tidak dapat mengelak liabiliti yang dikenakan oleh statut. Tiada apa-apa pun dalam skim perundangan yang terpakai mencadangkan bahawa pemilik dan MC boleh mengundurkan diri daripada kewajipan yang dikenakan oleh undang-undang bertulis. Atas sebab ini, pertikaian TT bahawa ia telah membayar untuk penyelenggaraan sendiri petak aksesori tempat letak kereta tidak menghilangkan liabilitinya untuk membayar caj yang telah dikenakan di bawah AHS dan di bawah Akta Pengurusan Strata 2013 (lihat perenggan 73).]

**Cases referred to**

*Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal* [2020] 4 MLJ 93, CA (distd)
*Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp* [2020] 12 MLJ 16, FC (folld)
*Muhamad Nazri bin Muhamad v JMB Menara Rajawali & Anor* [2020] 3 MLJ 645; [2019] 10 CLJ 547, CA (refd)
*Street v Mountford* [1985] AC 809, HL (folld)

**Legislation referred to**

Building and Common Property (Maintenance and Management) Act 2007 (repealed by Strata Management Act 2013)
Strata Management Act 2013 ss 12(2), 46, 50(3), 51(2), 52(1), (2), (3), 60(3), (3)(b), 70(5), (5)(a)
Strata Titles (Wilayah Persekutuan Kuala Lumpur) Rules 2019 Schedule 2
Strata Titles Act 1985 ss 4, 13(2), 18, 17, 34, 34(2), 41A(1), 45, 45(3)(b), 46, 69, Part VII
Town and Country Planning Act 1976

**Appeal from:** *Target Term Sdn Bhd v Waldorf and Windsor Management*

*Corporation (Malaysia Land Properties Sdn Bhd, intervener)* [2021] MLJU 2810 (High Court, Kuala Lumpur)

*Cyrus Das (with Sivabalan and Goh Wan Ping) (Mastura Partnership) in Civil Appeal No W-02(NCVC)(W)-1890–10 of 2021 for the appellant.*

*Andrew Davis (with Zaitul Naziah Mohd Soib and Anne Raj) (Andrew Davis & Co) in Civil Appeal No W-02(NCVC)(W)-1929–10 of 2021 for the appellant.*

*Kamarul Hisham Kamaruddin (with Loke Pooi Gee) in Civil Appeal Nos W-02(NCVC)(W)-1890–10 of 2021 and W-02(NCVC)(W)-1929–10 of 2021 for the respondent.*

**Azizul Azmi Adnan JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** There are two appeals before the court. The appellant in Appeal No 1929 is Malaysia Land Properties Sdn Bhd (referred to here as 'Mayland'). It was the developer of a mixed development complex in Taman Sri Hartamas, Kuala Lumpur, within which were comprised the Waldorf & Windsor Towers apartments. In 2009, Mayland entered into a sale and purchase agreement (the 'SPA') to sell to Target Term Sdn Bhd ('Target Term') one of the apartment units, unit B-21–03. The sale included 420 carpark units.

**[2]** Even though on paper Target Term did not appear as being owned by Mayland, before us in the appeal, counsel for Target Term and Mayland conceded that they were related corporations. By this, we understood that both companies were controlled by the same ultimate beneficial owner. Target Term is also the appellant in Appeal No 1890.

**[3]** It was not in material dispute that the intent of the sale to Target Term of the single apartment unit together with the 420 carpark units was in furtherance of a plan for Target Term to undertake a commercial carpark business. The strata title to unit B-21–03 was issued to Target Term on 19 March 2018. In the strata plan, 414 carpark units have been accessorised to the parcel identified as unit B-21–03.

**[4]** The respondent in both appeals is Waldorf and Windsor Management Corp, referred to in this judgment as the 'MC'. It is the management corporation in respect of the Waldorf & Windsor Towers, established under the Strata Management Act 2013.

**[5]** In 2017, the MC billed Target Term for arrears in management charges and sinking fund contributions amounting to over RM850,000. This

prompted Target Term to sue the MC in June 2017. It sought, among others, for a declaration that the back charges were null and void. Target Term's pleaded position was that the MC had not provided any maintenance services in respect of the cark park accessory parcels, and that all maintenance and other charges (such as electricity, security and cleaning costs) had been borne by Target Term.

**[6]** In response, the MC raised a counterclaim against Target Term and against Mayland. It sought to defeat the title of Target Term to the accessory parcels on the basis that (among others) the SPA contravened the applicable provisions of the Strata Titles Act 1985.

**[7]** The High Court dismissed the claim of Target Term in the main action, and allowed the counterclaim, declaring (among others) that the sale and purchase agreement for unit B-21–03 entered into between Target Term and Mayland was null, void and unenforceable and that the 414 carpark units were not accessory parcels but were in fact and law common property.

**[8]** In coming to this decision, the High Court (among others) held that:

(a) the use of the 414 carpark parcels in the commercial carpark business undertaken by Target Term contravened ss 34(2) and 69 of the Strata Titles Act 1985; and

(b) the provisions of the Strata Titles Act 1985 require an accessory parcel to be used in conjunction with the parcel to which they have been accessorised (B-21–03), and since they not used in conjunction with unit B-21–03, this illegality defeated the title of Target Term to the carpark parcels, which in turn meant that the carpark units were common property within the meaning of Strata Titles Act 1985.

THE STRATA TITLES ACT 1985

**[9]** Section 34 of the Strata Titles Act 1985 provides for the rights of a proprietor of a strata title. Subsection (2) prohibits independent dealing of an accessory parcel, and reads as follows:

> (2) No rights in an accessory parcel shall be dealt with or disposed of independently of the parcel to which such accessory parcel has been made appurtenant.

**[10]** This proscription is repeated in s 69, which contains an express reference to the strata plan:

> Section 69 No dealing in accessory parcel independent of a parcel
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> No accessory parcel or any share or interests therein shall be dealt with independently of the parcel to which such accessory parcel has been made

A appurtenant as shown on the approved strata plan.

**[11]** The definition of 'accessory parcel' in s 4 is set out as follows:

> 'accessory parcel' means any parcel shown in a strata plan as an accessory parcel which is used or intended to be used in conjunction with a parcel;

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**[12]** In coming to the decision that the carpark units were not accessory parcels but were common property, the High Court placed heavy reliance on the Court of Appeal case of *Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal* [2020] 4 MLJ 93.

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**[13]** In that case, the first defendant in the original action, Ideal Advantage Sdn Bhd, had purchased 45 condominium units from the developer, Muafakat Kekal Sdn Bhd, the second defendant. The purchase was recorded in 45 separate sale and purchase agreements. Ideal Advantage also bought 439 accessory carpark parcels. Five condominium units had only one carpark parcels made appurtenant to them, while the remaining 40 condominium units each had between eight to 15 accessory carpark parcels.

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**[14]** Ideal Advantage operated a commercial carparking business with the 439 carpark parcels.

**[15]** The Court of Appeal held that:

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(a) the use of the carpark parcels in a commercial enterprise was a use that was independent and separate from the use of the main parcels to which the carpark parcels were appurtenant;

(b) the letting out of the carpark units constituted a 'dealing' for the purposes of the Strata Titles Act 1985, and therefore the letting out of 394 carparks by Ideal Advantage (439 carpark units minus 45 condominium units) constituted a dealing that was prohibited by ss 34(2) and 69 of the Strata Titles Act 1985.

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**[16]** In relation to the meaning of the phrase 'dealt with' as used in ss 34(2) and 69 of the Strata Titles Act 1985, the Court of Appeal held as follows:

> [47] D1 and D2 alleged that the learned trial judge erred in law and fact when he failed to appreciate the words 'dealing' and 'dealt with' in the NLC and ss 34(2) and 69 of the STA 1985 do not include 'tenancy' which cannot be registered.
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> [48] On this issue, we refer to the provisions of s 5 of the NLC which defines 'dealing' as follows:
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> > 'dealing' means any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the

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provisions of any previous land law, but does not include any caveat or prohibitory order;

Section 205 of the NLC provides that:

(1) The dealings capable of being 'effected' (as opposed to 'registered') under this Act with respect to alienated lands and interests therein shall be those specified in Parts Fourteen to Seventeen, and no others.

A transaction under 'Division IV' of the NLC includes Part 15 of the same which has provisions on 'Tenancy' under ss 223–224. Part 14 of the NLC also deals with 'transfer exempt tenancies' pursuant to s 220 of the same.

[49] Therefore, by plain and unambiguous language, the term 'dealing' in the NLC includes 'tenancy'. This definition is imported into the STA 1985, where the word 'dealt with' appears in ss 34(2) and 69 of the STA 1985. These provisions are to be read together with ss 5(1) and 5(2) of the STA 1985 which provide:

5(1) This Act shall be read and construed with the National Land Code as if it forms part thereof.

(2) The National Land Code and the rules made thereunder, in so far as they are not inconsistent with the provisions of this Act or the rules made thereunder, or are capable of applying to parcels, shall apply in all respects to parcels held under the strata titles.

A reading of the aforesaid provision shows that the STA 1985 is to be read and construed as part of the NLC. The provisions of the NLC (which is not inconsistent with the STA 1985) shall apply in all respects to parcels held under the STA 1985, which includes the act of 'renting out'.

Section 4 of the STA 1985 utilises the words 'use' or 'intended to be used' which clearly includes the act of 'renting out' or 'tenancy' of an accessory parcel to a third party. This is consistent with the word 'dealt' or 'dealing' under the NLC.

[50] The act of renting out 394 car parks by D1 independent of the main parcels, constitutes 'dealing' of the accessory parcels, which is prohibited by ss 34(2) and 69 of the STA 1985, which includes any dealings by way of tenancies or the rental of car parks.

**[17]** In that case, the subdivision of the carpark parcels had not been conducted in accordance with the development order issued by MBPJ under the Town and Country Planning Act 1976. The Court of Appeal took this into consideration when it concluded that the initial sale of 40 of the 45 condominium units was unlawful and void, holding as follows:

[69] D1 in its memorandum of appeal alleges that the learned trial judge erred in law and fact when His Lordship failed to consider that the usage of the car parks by D1 was subsequent to the transaction between D1 and D2, therefore D1's intention to purchase the car parks cannot be accepted as a ground to declare the SPAs between D1 and D2 to be illegal.

A [70] Clearly that proposition cannot stand premised on the DO, the Town and Country Planning Act 1976 and the plain and ordinary meaning of the provisions of the STA 1985. The plain meaning of the provisions of the STA 1985 supports the purpose and objective of the statute in protecting the interest of the residents and owners of the parcel units of the condominium. Any consideration for the alleged B sale of the car parks under the 40 SPAs are therefore unlawful pursuant to s 24 of the Contracts Act 1950 which reads:

> 24 The consideration or object of an agreement is lawful, unless —
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> (a) it is forbidden by law;
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> C (b) it is of such a nature that, if permitted, it would defeat any law;
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> (c) ...
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> (d) ...
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> D (e) the court regards it as immoral, or opposed to public policy.
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> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

E As the intention of the sale of the accessory car park parcels is to defeat the STA 1985, the 40 SPAs are therefore unlawful and consequently void (in so far as 394 perimeter car parks are concerned).

[71] Therefore the learned trial judge did not err when he found that the sale of the accessory car parks are illegal and falls within s 24(b) of the Contracts Act 1950.

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**[18]** The Court of Appeal in *Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal* did not have the benefit of considering the subsequent Federal Court decision in *Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp* [2020] 12 MLJ 16.

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**[19]** In *Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp*, the management corporation of a condominium sued 20 proprietors of apartments in the condominium for letting out their units in short-term rental H arrangements procured through online booking platforms such as Airbnb, booking.com and Agoda. A general meeting of the management corporation had passed a resolution to pass a new house rule that prohibited the use of apartment units for business purposes, including for short-term rentals effected through online booking service providers. The defendants (who were the I appellants before the Federal Court) argued that the new house rule contravened s 70(5) of the Strata Management Act 2013, the material portion of which read as follows:

> (5) No additional by-law shall be capable of operating —

(a) to prohibit or restrict the transfer, lease or charge of, or any other dealing with any parcel of a subdivided building or land; and

(b) to destroy or modify any easement expressly or impliedly created by or under the Strata Titles Act 1985.

**[20]** The position of the defendants was that the short-term rentals constituted a 'dealing' for the purposes of s 70(5)(a), and hence their rights to let their apartment units out could not lawfully be curtailed by the new house rule.

**[21]** The Federal Court found that the arrangements in question were no more than mere licences and did not amount in law to 'dealings' for the purposes of s 70(5) of the Strata Management Act 2013. Accordingly, the new house rule did not have the effect of contravening s 70(5).

**[22]** Speaking for the Federal Court, Tengku Maimun Chief Justice summarised the applicable test to distinguish a tenancy from a licence in the following terms:

> [T]he following principles may be distilled from the English and Malaysian cases pre *Street v Mountford* [1985] AC 809 and read together with *Street,* on the test to distinguish between a tenancy and a licence:
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> (a) courts must first ask whether there is proof that the owner of the premises granted the occupier the right to exclusive possession of the premises. If the occupier can prove that he enjoys exclusive possession, then it is highly likely that the arrangement is a tenancy and not a licence. It would be for the other side, namely the grantor, to prove exceptional circumstances that despite the grant of exclusive possession to the occupier, parties did not intend to establish a tenancy;
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> (b) where the occupier is not conferred or is unable to establish that he has exclusive possession of the premises, the court must nonetheless determine the nature and quality of the occupancy. This includes analysing the terms of any written or oral agreement between parties as to whether they intended for the nature and quality of the occupancy to be more consistent with the rights of an occupier under a tenancy;
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> (c) 'intention' or 'nature and quality' here refer to specific indicators such as whether parties intended the occupier to have certain rights and obligations which are consistent with that of a tenant under tenancy laws — including but not limited to control of rent, and other relevant protections sufficient to create an interest in the land;
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> (d) where there is no proof of exclusive possession and there is not manifest any intention that the nature and quality of the occupancy do constitute

a tenancy, it would be appropriate for the court, in those circumstances, to conclude that the arrangement was intended to be merely a licence and not a tenancy;

(e) whatever labels parties use to describe their arrangement or the occupancy, for example, 'lease', 'tenancy' or 'licence' is relevant in the determination of their intention and the nature and quality of the occupancy, but is neither decisive nor conclusive. Accordingly, courts and judges must be mindful of the peculiar facts and circumstances of each and every case that comes before them; and

(f) in each and every case, particular emphasis needs to be paid to the substantive obligations parties have under the agreement, whether written or oral, and not so much the language and labels they ascribed to the words. This is important because unscrupulous parties might attempt to disguise the true nature of their agreement by bending the language they use to disguise it as one form of occupancy over another.

**[23]** Applying this test to the facts of the present case, we are under no doubt that the permission granted to a driver of a motorcar to enter into, and park in, the area designated as a carparking area for visitors would constitute no more than a licence and cannot be construed as a tenancy. While the driver is given permission, at the point of entry, to park his car in any available parking lot, that parking lot is not identified at the point of contract formation. It is only when he parks his car that the lot becomes identified. In this sense, he is not given exclusive possession of any parking lot upon his entry. Of course, once he had made his selection, no other motorcar may be parked in the parking lot so chosen, but this does not mean that other persons are prohibited from entering into the rectangular space marked out by the parking lot lines. Another person parking in an adjacent carpark lot, for example, may need to open her car door in a manner that will encroach into his chosen carpark lot. In any event, it is clear beyond peradventure that the contractual relationship between Target Term as the operator of the carpark and its customers was not intended to confer upon the latter rights and obligations consistent with those of tenants under tenancy laws.

**[24]** The learned judge in the court below considered the Federal Court decision in *Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp,* but elected to follow the decision in *Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal* on the basis that the latter case dealt specifically with ss 34(2) and 69 of the Strata Titles Act 1985. The High Court stated as follows:

> With respect to the plaintiff's counsel, *Innab Salil's* case only deals with s 70(5) of the SMA and not with ss 4, 34(2) and 69 of the STA where the Federal Court clearly stated that its interpretation of dealing is for the purposes of s 70(5) of the SMA.

**[25]** While is it is true that *Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp* dealt with s 70(5) of the Strata Management Act 2013, nonetheless the principles laid down by the Federal Court to distinguish between tenancies and licences are of general application. When those principles are applied to the facts of the present case, the inescapable conclusion must be that the carpark customers are mere licensees and not tenants.

**[26]** In coming to this conclusion, we consider ourselves bound by the subsequent decision of the Federal Court in *Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp.* We are of the view that this decision has the effect of impliedly overruling the earlier decision of the Court of Appeal in *Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal,* in so far as it pertains to the true construction of the contractual relationship between a carpark customer and its operator.

**[27]** It therefore follows that the construction of carpark rentals as a 'dealing' cannot be correct. The cognate expression 'dealt with' in ss 34(2) and 69 of the Strata Titles Act 1985 does not encompass the act of granting licences for temporary occupation to carpark customers.

**[28]** For these reasons, we are of the view that the act of operating a commercial carpark business on the accessory parcels does not constitute dealing in those accessory parcels, and accordingly does not contravene the statutory prohibition in ss 34(2) and 69 of the Strata Titles Act 1985 against independent dealing of accessory parcels.

**[29]** We are of the further view that accessory parcels constituted by the 414 carpark units cannot metamorphose into common property. In the Strata Titles Act 1985, common property is defined in s 4 in the following manner:

> 'common property' means so much of the lot as is not comprised in any parcel (including any accessory parcel), or any provisional block as shown in an approved strata plan;

**[30]** The term common property is thus defined by way of exclusion in the Strata Titles Act 1985. Common property is that which is not identified as a parcel in the strata plan.

**[31]** The expression 'accessory parcel' is in turn defined in s 4 of the Strata Titles Act 1985 the following manner:

> 'accessory parcel' means *any parcel shown in a strata plan as an accessory parcel* which is used or intended to be used in conjunction with a parcel; (Emphasis added.)

**[32]** In this case, the certified strata plan that has been exhibited in evidence

clearly shows the 414 carpark units being identified as being accessory parcels. Accordingly, once they have been identified as accessory parcels, they cannot in law be construed as common property.

**[33]** Much as has been by counsel for the respondents of the phrase 'which is used or intended to be used in conjunction with a parcel'. We were urged to conclude that, if the accessory parcel has not been used or was not intended to be used with the parcel to which it is appurtenant, then that accessory parcel loses its characterisation as a parcel and becomes subsumed into the common property of the building.

**[34]** We are unable to agree with this conclusion. First, nowhere in the Strata Titles Act 1985 is this legal consequence provided. Second, it is a fundamental rule of drafting (and consequently of construction) that definitions are not to contain the operative provisions of written law. If rights and obligations are intended to be created or annulled by a provision of law, then it must be set out in the body of the legislation. For this reason, we are of the considered view that the phrase 'an accessory parcel which is used or intended to be used in conjunction with a parcel' simply refers to an accessory parcel that has been made appurtenant to a parcel.

*The development order*

**[35]** It will be recalled that in the case of *Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal,* it was held that there had been contravention by the developer of the terms of the development order. This was one of the factors taken into account by the Court of Appeal to conclude that the sale of the carpark units in that case had been tainted with illegality.

**[36]** The present case is distinguishable on its facts.

**[37]** The initial terms of the development order dated 20 June 2002 issued to Mayland's architect imposed a condition that there be 700 carpark units. The subsequent development order issued on 27 September 2005 increased the requirement for carparks to 797 units. A re-amended development order was issued on 26 March 2008, which did not impose any requirement for any increase in the number of carparks, but reiterated the need for adequate carparks within the development area.

**[38]** The development orders issued in this case did not specify any breakdown between the carpark units to be made available for residents and for visitors. Nor was there any requirement imposed on the number of carpark units that were to be made appurtenant to a parcel. Furthermore, there was no

suggestion by the evidence on record that the number of carpark units were insufficient either for the use of residents or visitors.

**[39]** There was thus no contravention in the present case of the terms of the development orders. Even if breach of the terms of a development order regarding the allocation of carpark units could have the effect invalidating the title of a proprietor to those carpark units, on the facts of the present case, there was no such breach established.

**[40]** In their appeals, the appellants raised the question of whether the MC was possessed of sufficient locus standi to seek to strike down a private contract to which it was not a party. As we have allowed the appellants' appeal on the issue of the title to the accessory parcels, this issue of locus standi is now academic, and we see no necessity to address it in these grounds.

**[41]** In summary:

(a) because the act of letting out of a carpark unit as part of a business merely amounts to a licence to the carpark customer to use a unit of carpark, it does not amount to an act of dealing in the accessory parcels comprising the carpark units. For this reason, there was no contravention of the prohibition against independent dealing of accessory parcels contained in ss 34(2) and 69 of the Strata Titles Act 1985;

(b) on the facts of the present case, there was no contravention of the development orders that had been issued for the development of the subject building; and

(c) as a consequence of the findings in the preceding subparagraphs, the SPA was not illegal or void, and Target Term's title to the accessory parcels remains unaffected.

MAINTENANCE CHARGES AND SINKING FUND CONTRIBUTIONS

**[42]** In its counterclaim, the MC claimed for back charges from 11 July 2011 for maintenance charges and sinking fund contributions that it claimed were due from Target Term. Charges prior to this date was not claimed by the MC on the basis that they were time-barred.

**[43]** In Target Term's claim in the main action, it had sought for declarations that:

(a) the back charges imposed on it by the MC for the period between 24 January 2011 and 31 December 2016 were null and void; and

(b) the maintenance charge payable by it from 1 January 2017 be fixed at RM0.09 per share unit.

**[44]** The claim by the MC for back charges were an alternative prayer. As the High Court had ruled that the SPA was null and void and that Target Term's title to the subject property was consequently nullified, the issue of the back charges did not arise.

**[45]** With our ruling that the SPA was not null and void, the claim for the back charges now comes to the fore.

**[46]** The obligations of a proprietor of stratified property to make contributions to a maintenance account and sinking fund are governed by the Strata Management Act 2013, which came into force on 1 June 2015. Prior to this, the applicable provisions were contained in the Strata Titles Act 1985. In the following paragraphs, we outline the requirements under both Acts, as the period for which back charges were claimed spans across the two periods when the provisions of the different Acts were in force. (The management of stratified property prior to the formation of a management corporation was previously governed by the Building and Common Property (Maintenance and Management) Act 2007, but this Act is not relevant for the purposes of the issues arising in the present appeals.)

*The Strata Management Act 2013*

**[47]** Section 52(1) of the Strata Management Act 2013 is the principal provision that creates the obligation of proprietors to make contributions to the maintenance account and sinking fund in respect of a stratified property.

**[48]** The maintenance account is intended to be applied towards maintaining the common property and to meet the costs of the day-to-day running of the building. The specific manner in which the maintenance account may be used by a management corporation is set out in s 50(3). By contrast, the sinking fund to be applied to meet actual and expected capital expenditure, such upgrading, refurbishment and the replacement of equipment: see s 51(2). The sinking fund contribution is prescribed by s 52(3) to be 10% of the maintenance charges.

**[49]** Under s 60(3), a management corporation may determine the amount of maintenance charge to be raised from each proprietor in proportion to the share units held by the proprietor of a parcel. This is effected by way of a resolution passed at a general meeting of the management corporation.

**[50]** Where the management corporation has yet to convene a general meeting to determine the amount of maintenance charges payable, the charges will be those that were determined by the developer. A management corporation comes into existence by operation of law when the book of the strata register is opened (see s 17 of the Strata Titles Act 1985). In the present case, it was not disputed that the MC was established on 24 January 2011. Its first general meeting was only held on 23 July 2016. Sections 12(2) and 52(2) of the Strata Management Act 2013 provide that, until a management corporation passes a resolution fixing the maintenance charges, the applicable charges will those determined by the developer.

**[51]** The expression 'share units' in the Strata Management Act 2013 incorporates by reference the definition of that term as defined in s 4 of the Strata Titles Act 1985, which reads as follows:

> 'share units', in respect of a parcel, means the share units determined for that parcel as shown in the schedule of share units;

**[52]** Under s 18 of the Strata Titles Act 1985, the share units for a development area are to be approved by the Director of Land and Mines. Share units in respect of a development area located in Kuala Lumpur are calculated in accordance with the formula prescribed in Schedule 2 to the Strata Titles (Wilayah Persekutuan Kuala Lumpur) Rules 2019. In brief, share units are derived from the area of a parcel, but with certain weightages applied, depending on the type of parcel, and on the facilities that are available to the parcel. For a fuller explanation of the manner in which share units are calculated, see the decision of this court in *Muhamad Nazri bin Muhamad v JMB Menara Rajawali & Anor* [2020] 3 MLJ 645; [2019] 10 CLJ 547.

*The position prior to the coming into force of the Strata Management Act 2013*

**[53]** Before 1 June 2015, the maintenance of a management fund by a management corporation was governed under the Strata Titles Act 1985. There was no express mention of the expression 'sinking fund' under the Strata Titles Act 1985, although s 46 provides for a special account into which a portion of the contributions to the management fund shall be paid. This special account was intended to be used to defray expenses incurred for painting the building and other capital expenditure, and for this reason could be said to be an analogous precursor to the sinking fund under the Strata Management Act 2013. The amount of contributions to be paid into this special account must be determined by way a special resolution passed at a general meeting of the management corporation.

**[54]** This was a notable difference from the scheme subsequently introduced by the Strata Management Act 2013. Under the old laws, proprietors made a

periodical payment into the management fund, and there was no separate contribution by the parcel owners into the special account. The amount to be set aside and paid into the special account was determined by the management corporation by way of a special resolution passed at a general meeting. Under the new laws, two separate payments were due and payable by the parcel owners: the maintenance charges (specifically, the payments into the maintenance account), and the sinking fund contributions, which are fixed by statute at 10% of the management charges.

**[55]** Reverting to the position prior to 1 June 2015: under the since-repealed s 45(3)(b), the contributions to the management fund were levied on proprietors of parcels in proportion to the share units of their respective parcels. The amount to be levied must be approved at a general meeting of the management corporation. However, if a management corporation has come into existence but has not yet held its first general meeting, then the contributions payable by the parcel owners would be determined by the developer. The words of the since-deleted s 41A(1) reads as follows:

> (1) Where the first annual general meeting of a management corporation has not yet been convened, the proprietor of the parcels or provisional blocks, if any, in the subdivided building or land, whichever is applicable shall, commencing from the opening of the book of the strata register, pay to the management corporation *any sum determined by the original proprietor as the contributions payable* by the proprietors to the management fund of the management corporation. (Emphasis added.)

**[56]** We take the expression 'original proprietor' to refer to the developer.

**[57]** Prior to 1 June 2015, the share units were to be those set out in the schedule of share units that would be included in the certified strata plan approved by the Director of Surveys, in accordance with s 13(2) of the Strata Titles Act 1985.

*Is Target Term liable for the back charges?*

**[58]** The analysis relating to the existence and extent of Target Term's liability for back charges would be different for three separate periods:

(a) the period prior to 1 June 2015. In this period, the applicable provisions were those contained in Part VII of the Strata Titles Act 1985, which have since been repealed;

(b) the period between 1 June 2015 and 23 August 2016, which was the period when the applicable contributions would be those determined by the developer pursuant to s 52(2) of the Strata Management Act 2013; and

(c) the period after 23 August 2016, when the applicable contributions ought to be those approved by the MC in general meeting. However, as we shall see, an important issue arises on the ability of the MC to impose charges otherwise than on the basis of share units.

**[59]** The claims for back charges relating to each of these three periods are addressed in turn in the following paragraphs.

**[60]** For the period prior to 1 June 2015, Target Term would be liable to pay contributions to the management fund. There was, however, no separate obligation on it to pay sinking fund contributions, for the reasons explained at para [54] ante. It was not disputed that the management fund contributions prevailing prior to the first general meeting of the MC had been determined to be RM0.31/ft2, plus RM25 for each car park parcel. It may thus be deduced that this was the rate that had been fixed by Mayland as the developer, pursuant to s 41A(1) of the Strata Titles Act 1985, reproduced at para [55] ante.

**[61]** Although the management fund contributions that was to be fixed by the management corporation must be levied on proprietors in accordance with the share units held by the proprietors, that was not the case for management fund contributions determined by the developer pursuant to s 41A(1). Section 41A(1) did not expressly require management fund contributions to be payable in accordance with the share units held by the proprietors.

**[62]** If s 41A(1) is examined carefully, nowhere does the provision state that the sum determined by the developer as contributions to the management fund must be reckoned by reference to the share units held by the proprietors. This is to be contrasted with the contributions to the management fund that were to be fixed by the management company under the now-repealed s 45 of the Strata Titles Act 1985, sub-s 3(b) of which makes express reference to contributions being levied on the basis of share units held.

**[63]** For the period commencing from 1 June 2015, proprietors would have to make two contributions: they have to pay the charges to be paid into the maintenance account, and secondly they have to pay contributions into the sinking fund, which is set at 10% of the maintenance charges.

**[64]** As explained above, where the management corporation has yet to fix the applicable maintenance charges at its general meeting, the charges will be those determined by the developer. The relevant provision is s 52(2) of the Strata Management Act 2013, which reads as follows:

> (2) During the preliminary management period, the amount of the Charges to be paid under subsection (1) shall be determined by the developer in proportion to the share units assigned to each parcel.

**[65]** The expression 'preliminary management period' is defined in s 46:

> 'preliminary management period' means the period commencing from the date of delivery of vacant possession of a parcel to a purchaser by the developer until one month after the first annual general meeting of the management corporation;

**[66]** The first general meeting of the MC was held on 23 July 2016. There was thus an obligation on the parcel owners to pay the maintenance charges for the period between 1 June 2015–23 August 2016 (being the date one month after the first annual general meeting of the MC). Under s 52(2) of the Strata Management Act 2013, the charges ought to have been determined by the developer by reference to the share units held, but, as we have seen, the charges had in fact been imposed on the basis of square footage. The obligation to impose charges on the basis of share units in fact and law lay with Mayland, as the developer. We are of the view that it would not be just to deprive the MC from its legal entitlement by reason of a default of the developer, and we accordingly hold that Target Term is liable to the MC for:

(a) contributions to the maintenance account for the period between 1 June 2015 and 23 August 2016 at a rate of RM3.4045 per share unit; and

(b) contributions to the sinking fund for the same period at the statutorily prescribed rate of 10% of the maintenance charges.

**[67]** The rate of RM3.4045 per share unit is derived in the following manner. The rate that had been set by Mayland was RM0.31/ft2. Thus, for the apartment unit B-21–03 only (which was 1,230 ft2 in area), the maintenance charge would have been:

1,230 ft2 x RM0.31 = RM381.30

The apartment unit B-21–03 comprised 112 share units. Thus, the maintenance charge per share unit would be:

RM381.30 ÷ 112 share units ≈ RM3.4045 per share unit

The total share units for B-21–03 together with its 414 carpark accessory parcels is 5131, which meant that the total maintenance charge would be:

RM3.4045 x 5131 share units ≈ RM17,468.50

**[68]** For the period after 23 August 2016, we are of the considered view that the MC would not be entitled to the back charges for the maintenance charges and sinking fund for as long as it has not passed a resolution at a general meeting that conforms to the requirements set out in s 60(3)(b) of the Strata Management Act 2013. Section 60(3) reads as follows:

> (3) Subject to section 52, for the purpose of establishing and maintaining the maintenance account, the management corporation may at a general meeting —

(a) determine from time to time the amount to be raised for the purposes mentioned in subsection 50(3);

(b) raise the amounts so determined by imposing Charges on the proprietors in proportion to the share units or provisional share units of their respective parcels or provisional blocks, and the management corporation may determine different rates of Charges to be paid in respect of parcels which are used for significantly different purposes and in respect of the provisional blocks; and

(c) determine the amount of interest payable by a proprietor in respect of late payments which shall not exceed the rate of ten per cent per annum.

**[69]** This provision is clear in that the MC would only be permitted to impose charges for the purposes of the maintenance account if those charges are imposed in proportion to the share units or provisional shares units held by the respective proprietors. While the subsection permits the MC to impose different rates of charges, it does not permit the MC to impose charges on any basis other than share units or provisional share units. The rate of RM0.31/ft2 previously fixed cannot be charged, because this rate would only be applicable in respect of the preliminary management period, in accordance with s 52(2) of the Strata Management Act 2013.

**[70]** It would appear to us that one course of action open to the MC would be to immediately convene a general meeting to pass a resolution that complies with s 60(3), and thereafter to claim for arrears of contributions so determined to the extent that such claims are not barred by limitation. We express no view as to the legality or correctness of such a claim, as this is not an issue that is currently before us.

**[71]** The liability of Target Term for the back charges are summarised in the following table:

| *11 July 2011 to 31 May 2015* | *1 June 2015 to 23 August 2016* | *From 24 August 2016 onwards* |
|---|---|---|
| • RM0.31/ft² in respect of Unit B-21-03<br>• RM25 per car park parcel for each of the 414 accessory parcels | • RM3.4045 per share unit for maintenance charges<br>• RM0.34045 per share unit for sinking fund contribution | None, for as long as charges have not been imposed on the basis of share units |

**[72]** It will be recalled that, in support of its prayer for a declaration that the back charges were null and void, Target Term contended that the MC had not provided any maintenance services in respect of the cark park accessory parcels,

and that all maintenance and other charges (such as electricity, security and cleaning costs) had been borne by Target Term.

**[73]** We are of the view that Target Term would not be permitted to circumvent a liability that has been imposed by statute. There is nothing in the scheme of the applicable legislation to suggest that a proprietor and a management corporation can contract out of the obligations imposed by written law. For this reason, the contention by Target Term that it had undertaken its own maintenance of car park accessory parcels does not obviate its liability to pay for the charges that have been imposed under the Strata Titles Act 1985 and under the Strata Management Act 2013.

**[74]** Where however, a management corporation has refused to provide maintenance services when it is legally obliged to do so, it would be open to a proprietor to seek legal redress to compel the management corporation to provide such services. In addition, if the management corporation has refused to provide maintenance services and a proprietor has incurred costs in engaging a third-party contractor to perform such services, it would appear to us that such costs would be recoverable from the management corporation. In the present case, Target Term only sought for declaratory relief, which it is not entitled to for the reasons explained in the preceding paragraph.

**[75]** There are accordingly orders as follows:

(a) the appeals of Target Term and Mayland in Appeal Nos 1890 and 1929 are allowed in part, to the extent that paras 3–18 and 20–21 of the order of the High Court dated 21 September 2021 are set aside;

(b) the cross-appeal of the MC in Appeal No 1929 for general and exemplary damages is dismissed;

(c) Target Term to pay to the MC the excess of the back charges set out in para [71] of these grounds of judgment over the amounts actually paid;

(d) Target Term to pay pre-judgment interest on the sum of the amounts referred to in para (c) (the 'principal judgment amount') at a rate of 5%pa, from 14 June 2016 until today; and

(e) Target Term to pay post-judgment interest on the sum of the principal judgment amount and the pre-judgment interest at a rate of 5%pa from tomorrow until full satisfaction.

**[76]** We further order costs of RM100,000 here and below in favour of Target Term and Mayland, such costs to be subject to an allocatur.

*Order accordingly.*

Reported by Ashok Kumar